

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-185755

DATE: April 12, 1976

MATTER OF: Groton Piping Corporation and Thames
Electric Company (joint venture)

DIGEST:

1. Protest by small business alleging award should not be made to low bidder because it is large business bidding on small business set-aside procurement is denied, since set-aside determination was never made; synopsis in CBD showed no indication to restrict procurement; there was adequate competition among 16 bidders and low bidder is below Government estimate; and although restriction appeared in some IFB's, including that received by protester, due to agency oversight, it was deleted in IFB received by large business bidder.
2. Since determination was never made to set aside procurement, procedures pertaining to withdrawal of set-asides were not for application.
3. Decision as to whether procurement should be set aside for small business is within province of administrative agency.

This is a protest by Groton Piping Corporation and Thames Electric Company (G&T), doing business as a joint venture, against the award of a contract to Baldwin Stewart Electric Company (Baldwin), under invitation for bids (IFB) No. N62472-75-B-0230, issued by the Department of the Navy (Navy), Naval Facilities Engineering Command.

The IFB, issued on November 26, 1975, requested bids for utilities improvements at the Naval Submarine Base, New London, Connecticut. The procurement was not intended to be restricted to small business. However, some copies of the IFB did contain a small business set-aside restriction while it had been deleted from other copies. The agency report states:

"* * * In this case the IFB was mailed to all prospective bidders while the section on bidding information and the plans and specifications were being reproduced. Upon receipt of the section on bidding information,

the procurement clerk noticed that a notice on small business set aside had been printed. An 'X' was drawn on the master and the words 'deleted' on the left hand side of the page. * * * Despite the fact that all copies of the original reproduction showing the small business restriction should have been discarded, it appears that to some undeterminable extent, the deleted section was sent to some prospective bidders and the undeleted section to others."

On January 15, 1976, the date of bid opening, 16 bids were received. The low bidder in the amount of \$916,540 was Baldwin which represented itself as a large business. The second low bidder in the amount of \$1,089,081 was G&T which represented itself as a small business. The remaining bids ranged from \$1,089,100 to \$1,497,318. Only two bids were received from large business concerns.

By telegram dated January 16, 1976, G&T protested an award to any other bidder. In its letter of January 29, 1976, G&T contends that an award cannot be made to the low bidder, since it is a large business and paragraph 7 of section 00101 provides that bids received from firms which are not small business concerns shall be considered nonresponsive and shall be rejected. Further, G&T contends that the Navy did not follow proper withdrawal procedures for set-asides. In addition, G&T argues that while the Navy contends the procurement was never intended to be restricted to small business, it should have been, considering the advantages and benefits derived by doing business with small business concerns.

The inclusion of the set-aside provision in the IFB received by G&T was due to an agency oversight. The Navy never intended the IFB to be restricted to small business. The small business set-aside review form, executed by the small business specialist on November 26, 1975, and concurred in by the procurement officer on the same date, indicates that a determination was made that there not be a small business set-aside. In addition, the synopsis which appeared in the Commerce Business Daily on December 10, 1975, gave no indication that the Navy intended to restrict this procurement. Therefore, notwithstanding the provision in the IFB, a set-aside determination was never made. Thus, it would not be proper to apply the small business restriction to the IFB. Parenthetically, it is noted that G&T has stated that since filing the protest it has made a survey of the firms that bid and found that the IFB Baldwin received had the set-aside provision deleted. Therefore, Baldwin was not nonresponsive to the IFB it received because of its large business status.

B-185755

Further, since a determination was never made to set aside the procurement, the procedures pertaining to withdrawal of set-asides were not for application.

With regard to the G&T contention that the procurement should have been set aside even though not intended by the Navy, a similar position from a small business was considered in B-164555, September 10, 1968. In that decision it was stated:

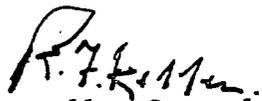
"Our Office has consistently recognized the established policy that a fair proportion of purchases of supplies and services be placed with small business concerns, which is in keeping with the national policy and the Small Business Act (15 U.S.C. 631 et seq.) as implemented by FPR 1-1.706. The decision, however, as to whether a certain procurement should be set aside in whole or in part for small business concerns is within the province of the administrative agency. Neither the provisions contained in the FPR nor the provisions of the Small Business Act make it mandatory that there be set aside for small business any particular procurement."

ASPR § 1-706 (1975 ed.) is the implementing regulation which pertains to the Navy, but the same reasoning applies.

The circumstances of the present case indicate that there was adequate competition. Sixteen bids were received with the low bid below the Government estimate of \$1 to \$2 million. Counsel for the protester also recognizes that "* * * the qualified bids submitted are both competitive and reasonable."

We are not unmindful that bidders, actual or potential, may have been misled as to the competition anticipated--and this factor merits serious consideration. However, any possible adverse effect on competition must be weighed against the fact that the prices of 16 bidders have been exposed and the deficiency here resulted from inadvertency discovered after bid opening. Accordingly, we concur with the Navy that the award should be made to Baldwin.

Therefore, the protest is denied.


Deputy Comptroller General
of the United States